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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. 15-6092

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to this Court's Rule 15.8, the United States submits this supplemental brief to address a decision handed down after the filing of the government's brief in response to the petition for a writ of certiorari

On December 17, 2015, the government filed a brief agreeing that the petition should be granted to resolve a conflict among the courts of appeals concerning the circumstances in which courts may employ the "modified categorical approach" set out in Taylor v. United States, 495 U S 575 (1990), and Descamps v United States, 133 S Ct 2276 (2013)

On December 28, 2015, the United States Court of Appeals for the Ninth Circuit, sitting en banc, issued a decision in Almanza-Arenas v Lynch, No 09-71415, 2015 WL 9462976, that further entrenches that conflict. In the course of reviewing a decision of the Board of Immigration Appeals, the en banc court in Almanza-Arenas considered when it is permissible to utilize the "modified categorical approach" in order to determine whether a defendant was convicted of an offense that satisfies a generic federal definition triggering immigration or criminal consequences

In line with the panel decision in Rendon v Holder, 764 F 3d 1077 (9th Cir 2014), the en banc court concluded that when a state statute sets out several forms of an offense in the alternative, some of which satisfy the generic definition and some of which do not, courts may find the statute "divisible" and thus may examine conviction records to determine which form of the offense was the basis for a conviction only if, under state law, jurors would be required in every case to be unanimous as to the form of the offense that a defendant had committed Slip op. 13-25 The court stated that the first step is to examine the text of the statute to ascertain whether its alternative, disjunctive phrasing creates "means" or "elements " Id. at 15-16 Next, a court should confirm its interpretation by examining the conviction documents "to see

whether the statute displays alternative elements," on which jurors must agree unanimously in order to return a conviction, "instead of alternative means of committing the same crime," on which jurors need not agree unanimously to convict. Id. at 16. Finally, the court stated, courts should look to state law, "to verify whether a state statute has elements or means." Id. at 20; see id. at 18-25

The en banc court acknowledged that its approach conflicted with the approaches of other courts of appeals See slip op 21 ("We recognize that not all of our sister circuits agree that courts should look to state law to determine a statute's elements following Descamps."). In particular, it acknowledged that the Tenth Circuit in United States v Trent, 767 F 3d 1046, 1061 (2014), cert denied, 135 S. Ct. 1447 (2015), had adopted a purely textual approach in analyzing when the modified categorical approach may be applied. Slip op 21 And it stated that while the Fifth Circuit had not directly "addressed the elements versus means distinction," id. 21 n 17, that court had stated that, contrary to the en banc court's approach, a "divisible statute is one defined 'alternatively, with one statutory phrase corresponding to the generic crime and another not,'" id. at 21 (quoting Franco-Casasola v Holder, 773 F 3d 33, 37-38 (5th Cir 2014))

Four of the ten judges who joined the majority opinion stated in a concurrence that they did so "because it correctly applies our precedent," but added that they did "not agree that our precedent is correct " Slip op 26; see id. at 26-27. The concurring opinion, authored by Judge Owens and joined by Judges Tallman, Bybee, and Callahan, stated that "[u]nder the current framework, hardened criminals avoid removal due to the vagaries of one state's law, while much softer individuals get shipped overseas because of the indictment template used in a different office." Id. at 26. While expressing the view that congressional involvement would be necessary to remedy the "arbitrariness" of the current system, the concurrence stated that this Court might need first "to wipe the slate clean by junking the current state of law " Ibid.

Judge Watford concurred in the judgment, setting forth his view that the approach of the en banc court was "inconsistent with the approach required by Descamps v United States " Slip op 27; see id. at 27-40. In Judge Watford's view, Descamps established that a statute was divisible, so that the modified categorical approach could be applied, "whenever the statute itself specifies, in the alternative, multiple ways a particular element can be satisfied." Id. at 30. Judge Watford emphasized that "questions of divisibility" arise "frequently * * * in both the criminal and immigration contexts " Id. at 28 As a

result, he stated, courts "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not " Ibid. He expressed the hope that "the Supreme Court will step in to provide further guidance" concerning divisibility. Ibid.

Because this en banc decision further entrenches the circuit conflict concerning when the modified categorical approach may be applied, the decision confirms the grounds for granting the petition for a writ of certiorari in this case.

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Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2015

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **SUPPLEMENTAL BRIEF OF THE UNITED STATES**, via email and first-class mail, postage prepaid, this 30th day of December, 2015.

[See Attached Service List]

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December 30, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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